Supreme Court, U.S.
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MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

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No. - .

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW BEDFORD FISHERMEN'S WELFARE FUND, ET AL.,
PETITIONERS,

v.

BALTIC ENTERPRISES, INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

SCOTT W. LANG
Counsel of Record
WILLIAM M. STRAUS
LANG, STRAUS, XIFARAS & BULLARD, P.A.
81 Hawthorn Street
New Bedford, Massachusetts 02740
(617) 992-1270
Counsel for Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

75pp

QUESTIONS PRESENTED

(1) Whether sections 502 and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 and 1145, permit multi-employer employee benefit funds to recover delinquent contributions in federal court which become due after the expiration of a collective bargaining agreement but before impasse in negotiations?

(2) Whether, in the event that district court jurisdiction is denied to the petitioners, they are barred from filing an unfair labor practice charge against an employer for violations of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5)?

(3) Whether the administrative law doctrine of primary jurisdiction would require a district court to

refrain from exercising its jurisdiction initially, until after the National Labor Relations Board has determined the question of an unfair labor practice, before exercising final jurisdiction on the issues of relief sought by the petitioners?

LIST OF PARTIES

Petitioners consist of the following multi-employer employee benefit plans, who appeared below as plaintiffs-appellants urging reversal of the District Court:

New Bedford Fishermen's Welfare Fund
New Bedford Fishermen's Pension Trust

Respondents consist of the following parties, who appeared below as defendants-appellees urging affirmance of the District Court:

Baltic Enterprises, Inc.
Robert Brieze

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

NEW BEDFORD FISHERMEN'S WELFARE FUND, et al.,

Petitioners,

v.

BALTIC ENTERPRISES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioners, plaintiffs-appellants in the proceedings below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered

March 11, 1987.

OPINIONS BELOW

The March 11, 1987, opinion of the United States Court of Appeals for the First Circuit is reported at 813 F.2d 503 and reproduced in Appendix B herein at 1b. The May 5, 1986, opinion of the United States District Court for the District of Massachusetts, which was announced from the bench, is reproduced in Appendix A herein at 1a.

JURISDICTION

The court of appeals judgment affirming the district court was entered on March 11, 1987. Appendix C at 1c. On April 16, 1987, the court of appeals denied timely petitions for rehearing and a suggestion for rehearing en banc. Appendix C at 3c. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132 and 1145 and Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) are set forth in Appendix D herein.

STATEMENT OF THE CASE

1. Proceedings in the District Court

The New Bedford Fishermen's Welfare Fund and the New Bedford Fishermen's Pension Trust, brought this action in the United States District Court for the District of Massachusetts seeking to enforce employer contributions to each of the respective employee benefit funds. Jurisdiction was claimed under section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132. The petitioning multi-employer

employee benefit funds were established by a series of collective bargaining agreements between employee unions and various employers in the fishing industry sailing from the Port of New Bedford, Massachusetts.

During the period March 28, 1982 to March 27, 1985, respondent, Baltic Enterprises, Inc., was a party to a collective bargaining agreement requiring regular employer contributions to the petitioners based upon a stated percentage of the proceeds of each fishing trip. Immediately upon the expiration of the contract on March 27, 1985, Baltic Enterprises, Inc., ceased making contributions under the terms of the collective bargaining agreement. Employees of the respondent were still represented by a union and a period for collective bargaining negotiations had

started. The petitioners made written demands for continued contributions by Baltic during the negotiation period but the respondent continued in its refusal to remit contributions.

In July 1985, petitioners filed suit against the respondents in the United States District Court for the District of Massachusetts, seeking to collect unpaid contributions for the period after March 27, 1985, while post contract expiration negotiations were pending. Petitioners alleged that Baltic Enterprises, Inc. was bound under federal law to maintain employer contributions during a period of collective bargaining negotiations. Petitioners alleged that jurisdiction to enforce this obligation in the federal courts was found in sections 502 and 515 of ERISA. Respondents later filed a motion to dismiss relying on Laborers

Health and Welfare Trust Fund, For Northern California, et al., v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985), cert. granted, _ U.S.____, 107 S.Ct 1283, 94 L.Ed.2d 142 (1987). The court allowed the motion to dismiss for lack of subject matter jurisdiction finding that under the doctrine of "primary jurisdiction" the petitioners' remedy was before the National Labor Relations Board. Pet. App. A.

2. Proceedings in the Court of Appeals

The court of appeals affirmed on the ground that the "primary jurisdiction" of the National Labor Relations Board required the federal courts to defer on questions involving the definition of unfair labor practices. The court acknowledged that "until negotiations

reach an impasse, employers such as Baltic are required by law to continue paying trust fund contributions even after the expiration of a collective bargaining agreement." Pet. App. B. However, relying on San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct 773, 3 L.Ed.2d 775 (1959), the court said that determinations of unfair labor practices rest with the National Labor Relations Board under notions of "primary jurisdiction". The court then adopted the analysis of Advanced Lightweight Concrete, 779 F.2d at 501-03, and concluded that the petitioners did not have a remedy in federal court under ERISA.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S CONSTRUCTION OF ERISA'S GRANT OF JURISDICTION INCORRECTLY INTERPRETS THE LEGISLATIVE HISTORY AND CONGRESS' INTENT TO PROVIDE EFFECTIVE SANCTIONS

AGAINST DELINQUENT EMPLOYERS.

ERISA section 502, 29 U.S.C. §1132, provides an explicit exception to the exclusive authority of the National Labor Relations Board. The statute authorizes multiemployer benefit funds to sue employers directly in federal district court to collect delinquent contributions which are due under section 515. 29 U.S.C. §1145. Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

In allowing benefit funds the ability to directly pursue employers in federal court, the statute also provides specific relief to successful plaintiffs in the

form of interest, liquidated damages and mandatory attorney's fees. The ERISA scheme of sections 502 and 515 is therefore a dual one; a federal court forum to seek relief and monetary penalties added to the delinquent contributions as an encouragement for employers to meet their legal obligations.

The court of appeals, however, adopted the position which has been taken in two other circuits. U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir. 1986); Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., 779 F.2d 497 (9th Cir. 1985), cert. granted, ____U.S.___, 107 S.Ct. 1283, 94 L.Ed.2d 142 (1987). The petitioners contend that the limitation

which the court of appeals found upon the authority of the funds to seek federal court enforcement of employer contributions is in error and should be reviewed by the grant of a writ of certiorari.

It is well established that after the expiration of a collective bargaining agreement and during negotiations for a new one, employers are required to continue trust fund contributions. See Peerless Roofing Co. v. N.L.R.B., 641 F.2d 734 (9th Cir. 1981) and Hinson v. N.L.R.B., 428 F.2d 133 (8th Cir. 1970). The obligation to maintain contributions arises from the collective bargaining obligation to bargain in good faith and maintain the status quo prior to a recognized impasse in negotiations or an agreement on a new contract. NLRB v. Katz, 369 U.S. 736, 743 (1962). Failure

to honor the terms of an expired agreement before impasse is an unfair labor practice under §§8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§158(a)(1),(5). NLRB v. Haberman Construction Co., 641 F.2d 351, 357 (5th Cir.1981)(en banc).

As a general rule, the determination of remedies following the occurrence of unfair labor practices falls to the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (question of conflict between state and federal remedies). However, Congress has created important exceptions to this notion of exclusivity within the agency in adopting §301(a) of the Labor Management Relations Act and §502 of ERISA. Simply because an employer's conduct is also an unfair labor practice, will not bar a federal court action for

breach of a labor agreement. Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267(1962).

The essential question, therefore, in deciding whether §515 permits a federal court action, is whether the NLRA obligation to maintain contractually mandated trust fund contributions falls within the §515 definition of obligations "under the terms of a collectively bargained agreement". If, as the funds maintain, the national labor policy requiring continued employer contributions is a part of an employer's §515 obligations, then the enforcement remedies provided by ERISA in §502 must also be available to trust funds in seeking to meet their fiduciary obligations to collect monies due the fund.

The funds contend that Congressional

use of the phrase "under the terms of a collectively bargained agreement" in §515 is a broader and more expansive term than the phrase "under a collective bargaining agreement" which was not used by Congress. In other words, contributions which must be made in accordance with the "terms" of an agreement is not a requirement that the contract document itself be in existence but could include the obligations to continue trust fund contributions in accordance with the requirements of §8(a)(5) of the NLRA.

This contention of the funds is clearly consistent with the indications of Congressional intent which accompanied the adoption of Sections 512 and 515 by Congress in 1980. The committee sponsors of the legislation were emphatic in the purposes for which these sections were added to the existing ERISA framework:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously and without regard to issues which might arise under labor-management relations law (other than 20 U.S.C. 186). Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises...[T]his legislation is intended to clarify the law...by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); id. at 23288 (remarks of Sen. Williams).

The clear policy enunciated by these remarks is also echoed in the report of the Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess. at 44 (Comm. Print April 1980). The strong enforcement policy inherent in the adoption of Section 515 has been acknowledged by the Supreme Court. Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 88, 70 L.Ed 2d 833, 846 (1982).

Additionally, Congress has evidenced a clear intent to provide substantial penalties for delinquent employers in Section 502 of ERISA, including mandatory attorney's fees, interest and liquidated damages. 29 U.S.C. §1132. In denying jurisdiction to the funds, the Court of Appeals has also denied to them these Congressionally mandated remedies. The Court of Appeals concluded that the alternative remedy of pursuing unfair

labor practice charges before the NLRB would still be available to the funds. App. 8b. However, in at least one case the remedies which were made available by the NLRB were limited to "out of pocket" medical expenses incurred by employees who required medical treatment rather than the entire amount of past health and welfare contributions, interest and liquidated damages. R.A. Barnes, Inc., 268 NLRB 343 (1983), 1983-84 CCH NLRB ¶ 16,002. As a result, a bar to federal court action and the remedies available under ERISA would force funds to employ the more limited tools which are granted to the agency in the NLRA. Again, absent a clear Congressional intent, to prohibit district court jurisdiction for the category of post-contract delinquencies, runs counter to the strong public policy goals of Congress to protect the fund

assets on which employees rely for their benefits. ERISA §1, 29 U.S.C. §1001.

II. THE COURT OF APPEALS INCORRECTLY APPLIED THE ADMINISTRATIVE LAW DOCTRINE OF PRIMARY JURISDICTION BY FAILING TO ORDER THAT THE ACTION BE STAYED PENDING THE BOARD'S DETERMINATION OF AN UNFAIR LABOR PRACTICE.

The administrative law doctrine of primary jurisdiction permits a court to defer action on a case while a particular issue is considered by an agency with specialized expertise in the area. As described by Professor Davis:

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.
>
> The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies,

> for it governs only the question whether court or agency will initially decide a particular issue, not the question whether court or agency will finally decide the issue. 3 K. Davis, Administrative Law Treatise §10.01, p.3 (1958) (emphasis in original).

cited in Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 199, n.29 (1978).

The court of appeals, however, did not correctly distinguish this concept of "primary jurisdiction" from the pre-emption doctrine of the same name which is described in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). In Garmon, the Court was confronted with an effort by state courts to regulate areas that were within the jurisdiction of the National Labor Relations Act. In order to avoid the danger of state

interference with the national policies inherent in the NLRA, the state's jurisdiction "must yield to the exclusive primary competence of the Board." Id. at 245. In other words, the Garmon doctrine of "primary jurisdiction" provides for the exclusion of state court intervention in an area which Congress has preempted. The court of appeals' reliance on Garmon to support its holding of National Labor Relations Board exclusivity ignores the significant difference in the two cases.

It is clearly wrong for the court of appeals to have held that Garmon supports a finding that the benefit funds' lawsuits under ERISA must be dismissed when they arise during post-contract negotiations. As Professor Davis noted more recently on this subject:

> The division of power between the NLRB and a Federal court is

> one of primary jurisdiction, but the division of power between the NLRB and a state court usually is mainly one of federalism, of division of power between nation and state.

K. Davis, Administrative Law, 2d Ed., Vol 4, §22.5 (1983). The petitioners contend that it is the administrative law doctrine of primary jurisdiction which should be applicable in this case; the Garmon result of dismissal is not to be applied, as the court of appeals directed, since there is absent the fundamental constitutional conflict between a state and the federal government.

Although Garmon represents an important judicial construction of Board authority under the NLRA, its conclusion that state court actions must be dismissed, does not support the court of appeals' conclusion that this action must

be dismissed. In this case, Congress has regulated the area with two related statutes, ERISA and the NLRA. The state interference issues which required dismissal in Garmon are not present. Rather, the Court must interpret the two Federal statutes in a way that would preserve the public policy goals of both, without rendering either ineffective. The funds contend that the proper use of the primary jurisdiction doctrine, as described by Professor Davis, serves the purposes in both statutes.

Simply because a case raises labor law issues under the NLRA, does not mean that subject matter jurisdiction is absent. In the case of Carpenters Local, 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), cert. denied 104 S.Ct.335 (1983), the court indicated that under "primary jurisdiction", district

court proceedings could be stayed while the NLRB reviewed a unit determination question essential to the Federal court action.

The court of appeals was in error, therefore, in declining to order a stay of the action while the NLRB reviewed the unfair labor practice charges which have been brought against the respondent, Baltic Enterprises, Inc.. Such a result would avoid the difficulties of a court ruling on questions involving the conduct of contract negotiations which were identified by the court of appeals in its opinion. App. B at 8b. Should the agency find that the respondent has committed an unfair labor practice, this finding could be adopted by the district court. The district court would then have the ability to employ the strong sanctions provided by Congress in section

502 to the particular case of an employer withholding contributions; these Congressionally mandated employer sanctions would not be available in proceedings limited to the National Labor Relations Board.

The public policy goals enunciated by Congress in both ERISA and the NLRA are preserved under a correct application of primary jurisdiction. The view of the court of appeals, however, results in a limitation on the ability of employee benefit funds to pursue delinquent employers; there is no indication in the language of the statute or in the legislative history that Congress intended any such limitation. In short, determinations of unfair labor practices may be reserved to the Board; where, however, Congress has also provided for special remedies under ERISA, benefit

funds would still have final access to the Federal courts in order to receive the complete relief provided in section 502.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

SCOTT W. LANG
Counsel of Record
WILLIAM M. STRAUS
Lang, Straus, Xifaras & Bullard, P.A.
81 Hawthorn Street
New Bedford, MA 02740
(617) 992-1270

May 13, 1987

APPENDIX "A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FISHERMEN'S WELFARE FUND, C.A. No. 85-2926-G

Plaintiff,

-vs-

BALTIC ENTERPRISES, INC., ET AL.,
Defendants.

Before: Hon. W. Arthur Garrity, Jr.,
Senior District Judge.

Courtroom No. 5
Post Office & Courthouse
Boston, Massachusetts
May 5, 1986

Appearances:

Lang, Straus, Xifaras & Bullard, Esqs.,
by William M. Straus, Esq.,
for the plaintiff.

Stanford & Schall, Esqs., by
Roger Stanford, Esq.; and
Gerald Franklin, Esq.,
for the defendants.

EXCERPT OF PROCEEDINGS

THE CLERK: Civil Action 85-2926-G, Fishermen's Welfare Fund versus Baltic Enterprises.

* * * * * * *

THE COURT: On the Baltic case, the Court grants the defendant's motion to dismiss. The easy basis for the Court's ruling is the decision of the Court of Appeals for the Ninth Circuit and the cases cited therein. I refer to Laborers Health and Welfare Trust Fund of Northern California against Advance Lightweight Concrete Company, Inc., Ninth Circuit, 1985, 779 F. 2d 497, and, as I say, the cases cited therein, which I believe address and reject the several contentions of the plaintiff here.

I do not, however, take easy avenues of decision where I think the parties deserve more, so I will state the other reasons for the decision, or at least the analysis of the court that I believe to be dispositive.

The problem first, of course, is the

provisions of the two declarations here involved, Exhibits A and B, the first pertaining to the welfare fund and the second pertaining to the pension trust. Well, the welfare fund states clearly that the obligation of the employer to contribute, and then I quote, "shall be for the duration of the collective bargaining agreement," and the pension fund incorporates the welfare plan fund by reference, so in this case, where the collective bargaining agreement expired as of March 27, 1985, the contractual obligation of the defendant ceased as of that time.

That is not the principal thrust of the plaintiff's complaint, however, because the plaintiff relies on the statutory obligations of the defendant. Looking to the obligation to contribute as provided by 29 U.S. Code § 1145, on

delinquent contributions, every employer who is obligated to make contributions under the terms of the plan, which is our case, or under the terms of the collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Well, we look not to the---When it says "in accordance with the terms and conditions," we are not looking to the date of termination or the duration of the agreement, but rather the amounts of the contributions and their factual predicates, and plaintiff contends that the obligation to contribute mandated in Section 1145 must be interpreted consistently with Section 1392(2) of Title 29, where it says, "Obligation to contribute means an obligation to

contribute arising (2) as a result of a duty under applicable labor-management relations law," so that is under a statutory duty, and there, the obligation to contribute subsequent to the termination of a plan, that is, the issue arises, well, now, during the life of the collective bargaining agreement, and concomitantly the life of the funds, there is an obligation.

That is easy.

But where does the obligation arise subsequent to the termination of the agreement? Well, we look there to the provisions of, again, the title, Section 1855, because it is provided that it is an unfair labor practice for an employer (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a). So it is true that an

employer's obligation extends beyond the termination of the contract and any obligation under the contract.

But the difficulty that I have in deciding the jurisdiction of the federal court, as distinguished from the board, meaning the National Labor Relations board, is that that provision imposing obligations beyond termination of the collective bargaining agreement comes under a definition of what is an unfair labor practice, and unfair labor practices and the determination of whether and to what extent they exist is the special prerogative of the board, not of the Court.

Secondly, I believe that for the Court to take jurisdiction would be inconsistent, or might prove to be inconsistent, with the board's jurisdiction in this matter.

On a slightly different point, it has not been contested here, and I gather it is correct, that the board has the right, and indeed responsibility, of determining the existence or not of an impasse, from which point the obligation to contribute does not survive.

Assume that the matter comes up before the board on the basis of a complaint filed on July one, and the Court on October one gets to the merits of the matter, and makes a ruling on the merits in plaintiff's favor. Is not that ruling of the federal court subject to revision by the board should it decide ultimately that the impasse did occur on the date of the filing of the complaint, namely, on or about the first of July?

If that is the case, there could be inconsistent determinations between the federal court and the NLRB, with the

latter having the last word. This seems to me to be a result which Congress could not have intended.

Furthermore, the plaintiff has emphasized -- and it is an appealing point -- that the fund is not -- neither fund is a party to the collective bargaining agreement, and has no control over its solvency. However, it is certainly clear in the Ninth Circuit Court decision cited that it believes -- and I do; I have no reason to doubt that this is the rule -- that resort to the board is not confined to parties to collective bargaining agreements. Innocent third parties, such as the fund in this instance, have access to the board.

Finally, while it is easy to overstate things, like inextricably intertwined, which is sort of a loose phrase, the

dispute here does involve -- whether inextricably I am not so sure, but it clearly involves an unfair labor practice allegation, and those are the matters as to which the board has primary jurisdiction.

It could be that the proper answer to this whole dispute is not as involved as the cases in the Ninth Circuit and elsewhere indicate. Perhaps it is really a matter of the doctrine of primary jurisdiction as we know it, that here you have a matter where the federal court needs more than anything else the expertise of administrative agencies that deal exclusively with certain types of problems, and that where the doctrine is applicable, dismissal is the proper course. It is not a question of suspending or staying proceedings. Where the doctrine of primary jurisdiction is

applicable, courts do dismiss the case.

For all of those reasons, I do believe that the defendant's motion must be granted. Whether my reasons as spelled out are of equal weight to those of the Ninth Circuit I have some doubt. I do think, however, that that opinion does apply here. So those are the reasons for my ruling, and I grant the motion to dismiss.

That is all we will do in this matter today.

MR. STRAUS: Thank you, your Honor.

MR. STANFORD: Thank you, your Honor.

[Thereupon the hearing was concluded.]

APPENDIX "B"

NEW BEDFORD FISHERMEN'S WELFARE FUND, BY ITS TRUSTEES, ET AL.,
Plaintiffs, Appellants,

v.

BALTIC ENTERPRISES, INC., ET AL.,
Defendants, Appellees.

No. 86-1537.

United States Court of Appeals,
First Circuit.

Argued Jan. 6, 1987.

Decided March 11, 1987.

William M. Straus with whom Lang, Straus, Xifaras & Bullard, P.A., New Bedford, Mass., was on brief, for plaintiffs, appellants.

Roger Stanford with whom Stanford & Schall, New Bedford, Mass., was on brief, for defendants, appellees.

Before COFFIN, Circuit Judge, ALDRICH and ROSENN, *Senior Circuit Judges.

COFFIN, Circuit Judge.

This case requires us to decide

whether a federal district court has subject matter jurisdiction to entertain an action initiated by a multiemployer employee benefit fund under the Employment Retirement Income Security Act of 1974 ("ERISA") to collect unpaid contributions accruing after the expiration of a collective bargaining agreement. We join the Fifth and Ninth Circuits in holding that the "primary jurisdiction" of the National Labor Relations Board precludes such an exercise of jurisdiction. See U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir.1986); Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., 779 F.2d 497 (9th Cir.1985), cert. granted, ___U.S. ___, 107 S.Ct. 1283, 94 L.Ed.2d 142

(1987).

Appellants New Bedford Fishermen's Welfare Fund and New Bedford Fishermen's Pension Trust ("Funds") are multiemployer trust funds established pursuant to section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(g). Appellee Baltic Enterprises, Inc. ("Baltic") entered a written collective bargaining agreement obligating itself to make employer contributions to the Funds beginning on March 28, 1982. On March 27, 1985, the collective bargaining agreement expired and, since that date, Baltic has failed to make any contributions to the Funds.

The Funds initiated an action in federal court seeking to compel Baltic's payment of the allegedly delinquent contributions. They reason that Baltic has a duty under NLRB v. Katz, 369 U.S.

736, 745, 82 S.Ct. 1107, 1112, 8 L.Ed.2d 230 (1962), to honor the terms of the expired collective bargaining agreement until the parties reach an impasse in negotiations. The Funds' complaint alleged jurisdiction based on section 301 of the LMRA, 29 U.S.C. §185, and sections 502 and 515 of ERISA, 29 U.S.C. §§1132, 1145. The district court granted Baltic's motion to dismiss due to lack of subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), and this appeal ensued. (Appellants have withdrawn their appeal as to the district court's decision denying jurisdiction pursuant to section 301 of the LMRA.)

The Funds correctly assert that, until negotiations reach an impasse, employers such as Baltic are required by law to continue paying trust fund contributions even after the expiration of a collective

bargaining agreement. Peerless Roofing Co. v. NLRB, 641 F.2d 734 (9th Cir.1981); Hinson v. NLRB, 428 F.2d 133 (8th Cir.1970). Failure to do so constitutes an unfair labor practice under sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §158(a)(1), (5). NLRB v. Haberman Construction Co., 641 F.2d 351, 357 (5th Cir.1981) (en banc). The initial determination of whether a challenged activity is an unfair labor practice, however, generally rests with the Board, not with the federal courts. In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the Supreme Court held that "[w]hen an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National

Labor Relations Board...." Id. at 245, 79 S.Ct. at 779.

ERISA section 502, 29 U.S.C. §1132(a)(3), is an exception to the general rule that federal courts must always defer to the Board's determination. It authorizes multiemployer benefit funds to sue employers directly in federal district court to collect delinquent contributions due under section 515. Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement.

29 U.S.C. §1145. ERISA, however, does not explicitly govern suits to collect delinquent contributions that accrue after the expiration of a collectively

bargained agreement. Furthermore, a review of the statute and its legislative history--which are more than adequately discussed in the opinions of both Judges Pregerson and Wisdom--does not persuade us that Congress sought to extend the subject matter jurisdiction of the federal courts to encompass cases such as the one before us today. See Rester Refrigeration, 790 F.2d at 426 (Wisdom, J.); Advanced Lightweight Concrete, 779 F.2d at 501-03 (Pregerson, J.). Rather than rehearse these arguments yet again, we simply adopt the analysis contained in those opinions.

As Judge Wisdom has stated:

> The key issue on the merits is whether the parties have reached an impasse. To resolve this issue, the factfinder must consider a varety of factors such as the bargaining history, the importance of the issue or issues on which the parties disagree, the number of meetings between the parties, the length of the meetings, and the amount of time elapsed since

negotiations began. The outcome often turns on slight factual differences. Because of its specialized expertise, the Board is particularly qualified to decide such a question.

Rester Refrigeration, 790 F.2d at 426 (footnote omitted). We likewise believe that the proper course is to defer to the Board's "primary jurisdiction" to determine whether Baltic's conduct amounted to an unfair labor practice. We therefore affirm the decision of the district court dismissing the complaint, and note that such dismissal was properly without prejudice to the Funds' right to assert their claims before the Board and to take such future action in the federal courts as may be appropriate. (Although appellants argued for a stay rather than a dismissal, a stay would be inappropriate in view of our holding that the district court lacked subject matter jurisdiction. The authorities cited by

the appellants in support of their argument for a stay were all cases in which an issue was stayed pending a decision by the NLRB. The courts in those cases did not, as here, lack subject matter jurisdiction over the entire controversy.)

Affirmed.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1537

NEW BEDFORD FISHERMEN'S WELFARE FUND,
BY ITS TRUSTEES, ET AL.,
Plaintiffs, Appellants,

v.

BALTIC ENTERPRISES, INC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: March 11, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Straus and Stanford]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1537.

NEW BEDFORD FISHERMEN'S WELFARE FUND,
BY ITS TRUSTEES, ET AL.,
Plaintiffs, Appellants,

v.

BALTIC ENTERPRISES, INC., ET AL.,
Defendants, Appellees.

Before

CAMPBELL, Chief Judge,

ALDRICH and ROSENN,* Senior Circuit Judges,

COFFIN, BOWNES, BREYER, TORRUELLA and SELYA, Circuit Judges.

ORDER OF COURT

Entered: April 16, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing, and the

suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service, and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be, and the same hereby are, denied.

By the Court:

Francis P. Scigliano

Clerk.

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*Of the Third Circuit, sitting by designation.

[cc: Messrs. Straus and Stanford]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1537

NEW BEDFORD FISHERMEN'S WELFARE FUND,
BY ITS TRUSTEES, ET. AL.,
Plaintiffs, appellants,

v.

BALTIC ENTERPRISES INC., ET. AL.,
Defendants, appellees.

ORDER OF COURT

Entered: April 23, 1987

Upon motion of plaintiffs, appellants to stay mandate herein pending on application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by May 25, 1987 and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed until May

25, 1987.

By the Court,

Francis P. Scigliano

Clerk.

[cc: Messrs. Straus, Franklin and Stanford]

APPENDIX "D"

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

CIVIL ENFORCEMENT

ACT SEC. 502. (a) A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or

practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any

civil penalty under subsection (i).

ACT SEC. 502. (b)(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if --

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case

of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515.

ACT SEC. 502. (c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's

discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

ACT SEC. 502 (d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding

sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

ACT SEC. 502. (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of

this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

ACT SEC. 502 (f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

ACT SEC. 502 (g)(1) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to

either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of -

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

ACT SEC. 502 (h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be

served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

ACT SEC. 502. (i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except

that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

ACT SEC. 502. (k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought

in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

ACT SEC. 515. Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

NATIONAL LABOR RELATIONS ACT,

Section 8(a)(5)

(a) It shall be an unfair labor practice for an employer --

* * *

(5) to refuse to bargain

collectively with the representatives of his employees, subject to the provisions of section 9(a).